

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the proposed amendment) NOTICE OF PUBLIC HEARING
of ARM 24.29.2831 related to penalties) ON PROPOSED AMENDMENT
assessed against uninsured employers)

TO: All Concerned Persons

1. On July 28, 2006, at 11:00 a.m., or as soon thereafter as is feasible, a public hearing will be held in the first floor conference room, Room 104, of the Walt Sullivan Building, 1327 Lockey Avenue, Helena, Montana to consider the proposed amendment of the above-stated rule.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on July 24, 2006, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Department of Labor and Industry, Attn: Cathy Brown, P.O. Box 8011, Helena, MT 59604-8011; telephone (406) 444-7720; fax (406) 444-3465; TDD (406) 444-5549; or e-mail cabrown@mt.gov.

3. The rule proposed to be amended provides as follows, stricken material interlined, new material underlined:

24.29.2831 COLLECTION OF PENALTIES AND OTHER PAYMENTS
FROM UNINSURED EMPLOYERS (1) and (2) remain the same.

(3) To the extent that the state compensation insurance fund (plan no. 3) has a multiple pricing of premium structure in effect during any period in which the employer was uninsured, the penalty ~~will~~ may be calculated using the ~~rate~~ highest tier (or pricing level) that ~~would~~ could have been charged by the state fund during that period. ~~If there is evidence that a premium modifier would have been applied by plan no. 3, the penalty will be calculated according to a premium rate that includes the modifiers.~~

(a) For good cause shown, the penalty will be calculated using the rate the state fund would have actually charged the employer during the uninsured period. The employer has the burden of proof of establishing what rate or rates would have been charged by the state fund during the uninsured period.

(b) The employer has the burden of proof of establishing good cause for use of the lower rate as provided in (3)(a).

(i) The employer's alleged financial inability to pay the cost of workers' compensation insurance premium during the uninsured period does not constitute "good cause" for the purposes of this rule.

(ii) The employer's alleged financial inability to pay the penalty imposed by this rule does not constitute "good cause" for the purposes of this rule.

(4) remains the same.

AUTH: 39-71-203, MCA

IMP: 39-71-504, MCA

REASON: There is reasonable necessity to amend ARM 24.29.2831 in order to clarify the process that the uninsured employers' fund ("the UEF") assesses penalties against uninsured employers, as provided by 39-71-504, MCA. With the relatively recent change by the state compensation insurance fund ("the state fund") to a five-level pricing structure from a three-tiered structure, the existing rule provisions did not provide suitable clarity or guidance to UEF auditors or uninsured employers to readily calculate the amount of penalty being imposed. In proposing the amendments, the UEF considered using either the highest rate (tier 5) or the median rate (tier 3) set by the state fund for each applicable classification code. The state fund's current practice is to assign a new employer [one without a history of doing business with the state fund] initially to tier 4. The UEF believes that using the highest tier (pricing level) is consistent with the legislative requirement that an uninsured employer pay a penalty for failing to provide legally required workers' compensation coverage for its employees. The UEF notes that using a lower tier for establishing the penalty may provide some economic incentive for an employer to flaunt the coverage requirements of the law, figuring that if caught, the employer would only have to pay the rates it likely would have been charged had it complied with the law. In addition, deletion of the word "rate" and the use of "tier" or "price level" clarifies that the pricing structure, rather than classification codes, is what is being discussed in the rule. The UEF believes that the proposed "good cause" provisions provide a means to ameliorate any perceived harshness of the proposed amendments. Finally, the UEF also believes that it is reasonably necessary to advise uninsured employers in advance that a claim of inadequate financial resources is not, and will not be, considered to be "good cause" under the rule.

Based upon approximately 650 uninsured employers penalized during fiscal year 2005, and assuming the same level of enforcement activity, the UEF estimates that approximately 650 uninsured employers a year may be affected by the proposed amendments. The UEF is unable to estimate the fiscal impact on uninsured employers, because of the variability of the factors (amount of payroll, worker classification codes, length of time uninsured, and dates of uninsured periods) that make up the penalty, and due to the relatively low payment (collection) level on penalties.

4. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Keith Messmer, Bureau Chief, Workers' Compensation Regulations Bureau, Employment Relations Division, Department of Labor and Industry, P.O. Box 8011, Helena, Montana 59604-8011; by facsimile to (406) 444-3465; or by e-mail to kmessmer@mt.gov, and must be received no later than 5:00 p.m., August 4, 2006.

5. An electronic copy of this Notice of Public Hearing is available through the department's site at <http://dli.mt.gov/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in accessing the website or sending an e-mail do not excuse late submission of comments.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Department of Labor and Industry administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1327 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

8. The department's Hearings Bureau has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ DORE SCHWINDEN
Dore Schwinden, Deputy Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State June 26, 2006